



In the Matter of

WC Docket No. 17-108

Respectfully submitted,

/s/

Joe Kane  
Technology Policy Associate

August 30, 2017

## I. Introduction & Summary

More than 20 million comments have been filed in response to the Restoring Internet Freedom notice of proposed rulemaking (“NPRM”)<sup>1</sup> released by the Federal Communications Commission (“FCC” or “Commission”) this past May,<sup>2</sup> which proposes to undo significant portions of the 2015 Open Internet Order.<sup>3</sup> In addition to those filed by us here at R Street Institute (“R Street”), many commenters filed detailed responses that attempted to engage with each of the substantive issues raised in the NPRM,<sup>4</sup> and we appreciate the opportunity to respond to some of those comments here.

However, many others have filed comments that were brief, unresponsive and perhaps even fraudulent.<sup>5</sup> These have swelled the docket to an unprecedented size — for the FCC or any other administrative agency.<sup>6</sup> Accordingly, even with the recent deadline extension,<sup>7</sup> it is practically impossible for interested parties like R Street to review and respond to all arguments raised in the initial round of comments. For this reason, we do not

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<sup>1</sup> Restoring Internet Freedom, *Notice of Proposed Rulemaking*, WC Docket No. 17-108 (May 23, 2017) [“NPRM”], available at <https://goo.gl/ecJlPM>.

<sup>2</sup> See Ali Breland, *Net Neutrality Comments Top 20 Million*, THE HILL (Aug. 17, 2017), available at <https://goo.gl/E66ZP9>.

<sup>3</sup> See Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28 (Mar. 12, 2015) [“2015 Order”], available at <https://goo.gl/dvjEUP>.

<sup>4</sup> Restoring Internet Freedom, *Comments of R Street Institute*, WC Docket No. 17-108 (July 17, 2017) [“R Street Comments”], available at <https://goo.gl/S2V2HG>.

<sup>5</sup> See, e.g., Peter Flaherty, *Another 5.8 Million Fake Net Neutrality Comments Found; 1.5 Million Fakes Put Online for Public Scrutiny*, NAT’L LEGAL & POL’Y CTR. (Aug. 8, 2017), available at <https://goo.gl/fSeRdm>.

<sup>6</sup> See Giuseppe Macri, *Net Neutrality Supporters Pressure FCC to Extend Comment Deadline*, INSIDE SOURCES (Aug. 3, 2017), available at <https://goo.gl/58mK7h>.

<sup>7</sup> Restoring Internet Freedom, *Order*, WC Docket No. 17-108 (Aug. 11, 2017), available at <https://goo.gl/2HiRqr> (extending reply comment deadline to August 30, 2017).

attempt to do so here. Rather, in these reply comments, we seek to do only two things: parse through the dueling narratives regarding the impact of Title II on infrastructure investment and clarify the proper roles that state and local authorities should play in broadband regulation going forward.

## **II. Dueling Narratives on Investment**

Major rulemakings often divide public opinion, so it is no surprise to see substantial disagreements in the record between commenters' preferred approaches to future broadband regulation. What is surprising, though, are the dueling narratives in the record regarding the impact that Title II has had on infrastructure investment because that is not a subjective question of opinion but an objective question of fact.

Based on empirical studies and industry filings, the evidence is unambiguously clear: The Title II reclassification of broadband has already decreased infrastructure investment, and keeping it in place will likely continue to decrease investment going forward. Arguments that suggest otherwise are either weak or unfounded, and should therefore be rejected.

### **A. Empirical Studies**

Our original comments drew attention to an empirical study of Title II's effect on broadband infrastructure investment by Dr. George Ford, Chief Economist for the Phoenix Center for Advanced Legal and Economic Public Policy Studies.<sup>8</sup> The Ford study is the most rigorous and methodologically sound examination of the issue because it conducts a

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<sup>8</sup> See R Street Comments, at 10–11.

counterfactual analysis to estimate what investment would have been if not for the threat and later application of Title II to broadband.<sup>9</sup>

A paper by Dr. Christopher Hooton, Chief Economist for the Internet Association, critiques the Ford study, but those criticisms seem to misunderstand the econometric techniques that Ford used.<sup>10</sup> A notable example of this misunderstanding is Hooton's claim that Ford employs an "incoherent counterfactual strategy" because he includes several different industries in the control group.<sup>11</sup> This practice, however, is a perfectly sensible way to construct a control group.

Because a true control group is not available here to test the effect of a nationwide policy over time, Ford looked to other industries that have mirrored the telecommunications sector for the dependent variable (i.e., investment). By selecting the four industries that most closely parallel telecom, Ford was able to use the combination of these industries as an effective control group. Investment rates for these five industries (i.e., the four in the control group plus telecom) have moved in parallel in the past, and thus we should expect them to continue to move together in the future, unless an intervention in one causes an effect not present in the others. In fact, this is exactly what the Ford study found: Investment in the control group remained roughly parallel, but, after the treatment

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<sup>9</sup> See George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, PERSPECTIVES (Apr. 25, 2017) ["Ford Study"], available at <https://goo.gl/jfj9rc>.

<sup>10</sup> See Christopher Hooton, *An Empirical Investigation of the Impacts of Net Neutrality* (2017) ["Hooton Study"], available at <https://goo.gl/mn1PqK>; see also Restoring Internet Freedom, *Comments of Internet Association*, WC Docket No. 17-108 (July 17, 2017), <https://goo.gl/eMKoo9>.

<sup>11</sup> Hooton Study, at 6.

date — when the FCC first raised the threat of Title II regulation in 2010<sup>12</sup> — telecom investment fell significantly below the trend.<sup>13</sup>

Hooton's own study acknowledged the essential role of constructing a counterfactual, unlike some other attempts to study the issue.<sup>14</sup> Unfortunately, his study suffers from various methodological shortcomings that cast serious doubt on its conclusions.<sup>15</sup> First, the data used are highly suspect. Hooton relies heavily on data that he does not actually possess, instead relying on data that have been either interpolated or extrapolated.<sup>16</sup> Indeed, these data make up 7 of the 10 years of the treatment period in the study.<sup>17</sup> In his response to the Hooton study, Ford observed that "Dr. Hooton has simply

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<sup>12</sup> See Framework for Broadband Internet Service, *Notice of Inquiry*, GN Docket No. 10-127 (June 17, 2010), available at <https://goo.gl/dxkCxG> (inquiring whether broadband should remain classified under Title I or be reclassified under Title II).

<sup>13</sup> Ford Study, at 7.

<sup>14</sup> See, e.g., S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets are Thriving in the Title II Era*, FREE PRESS (May 2017), available at <https://goo.gl/3oQSBT> (purporting to show that Title II has not decreased broadband infrastructure investment by citing a five percent investment increase since February 2015).

<sup>15</sup> See George S. Ford, *A Review of the Internet Association's Empirical Study on Network Neutrality and Investment*, PERSPECTIVES at 1 (July 24, 2017) ["Ford Review"], available at <https://goo.gl/w73g3D> ("Dr. Hooton's empirical work suffers from a number of fatal and sometimes shocking defects, including making up a significant part of his data").

<sup>16</sup> See George S. Ford, *A Further Review of the Internet Association's Empirical Study on Network Neutrality and Investment*, PERSPECTIVES at 1 (Aug. 14, 2017) ["Ford Further Review"], available at <https://goo.gl/kLmswL> ("Dr. Hooton fabricates (via interpolation) three-fourths of the data he analyzes from SNL Kagan for cable industry broadband investment").

<sup>17</sup> Ford Review, at 6.

made his data up.”<sup>18</sup> Moreover, Hooton pulled data from multiple disparate sources, which do not “allow for multiple direct ‘apples-to-apple’ comparisons” as he claimed they do.<sup>19</sup>

These methodological flaws alone cast serious doubt upon the validity of Hooton’s study. However, even without these flaws, his conclusions do not support maintaining the Title II classification of broadband. Hooton concluded that there has been no effect of Title II classification on investment,<sup>20</sup> but the 2015 Order’s “virtuous cycle” theory suggested that such classification would actually increase broadband investment.<sup>21</sup> If the theory that supported the switch to Title II were correct, we should see a positive effect born out in the data. Therefore, even if Hooton’s findings have merit, they show the 2015 Order is not operating as intended.

## **B. Statements by Broadband Providers**

A frequent refrain among opponents of the plan to Restore Internet Freedom and reclassify broadband under Title I is that broadband providers themselves have told investors that Title II regulation would not threaten their businesses or decrease

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<sup>18</sup> *Id.*

<sup>19</sup> See Hooton Study, at 10 (“Unlike other previous analyses without counterfactuals or that have used inappropriate counterfactuals that are dissimilar and incomparable, this paper’s approaches allow for multiple direct ‘apples-to-apples’ comparisons between treatment group and control as well as a clearer treatment action”); Ford Review, at 6 (“While Dr. Hooton claims to provide an ‘apples-to-apples comparison,’ his mixing of data from USTelecom, OECD, PwC, Oxford Economics, and his own forecasts, perhaps applied inconsistently between the U.S. and OECD, is a mix of not only many fruits but some meats and cheeses too”).

<sup>20</sup> Hooton Study, at 22.

<sup>21</sup> 2015 Order, ¶ 142 (“Internet openness drives a ‘virtuous cycle’ in which innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure”).

investment.<sup>22</sup> The argument here is that since it is illegal for these companies to lie to their investors, it must be the case that investment is not threatened by Title II.<sup>23</sup> This chain of reasoning is logically valid, but the conclusion drawn from it is based on a very selective reading of the record.

To begin with, many of the statements to investors regarding the impact of Title II are ambiguous, and Free Press mischaracterized them as saying that everything with Title II is fine. They included statements like that of AT&T CEO Randall Stephenson, who said the company planned to “deploy more fiber next year than we did this year” and was “getting more efficient all the time.”<sup>24</sup> Free Press underlined these quotes as though they caught AT&T red-handed, but, in fact, Stephenson’s statements do nothing to support Free Press’s argument. As we noted above and in our original comments, the relevant question is not *whether infrastructure investment or efficiency increased or decreased* in an absolute sense.<sup>25</sup> Rather, the relevant question is *what those measures would have been* in the

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<sup>22</sup> See, e.g., Turner, *supra* note 14, at 3 (“We also present voluminous comments that cable- and telephone-company ISP executives made to investors concerning the impact (or, in reality, the *lack of any appreciable negative impact*) that Title II had on their broadband deployments”) (emphasis in original).

<sup>23</sup> See, e.g., Jon Brodtkin, *Title II Hasn’t Hurt Network Investment, According to the ISPs Themselves*, ARS TECHNICA (May 16, 2017), available at <https://goo.gl/PBHU7Y> (“Publicly traded companies are required to give investors accurate financial information, including a description of risk factors involved in investing in the company. If Title II imposed significant financial burdens on publicly traded Internet providers, the companies should have informed investors”).

<sup>24</sup> See Turner, *supra* note 14, at 87 n.235 (emphasis omitted); see also Restoring Internet Freedom, *Comments of Free Press*, WC Docket No. 17-108, at 243 (July 17, 2017) [“Free Press Comments”], available at <https://goo.gl/KxP6uF>.

<sup>25</sup> R Street Comments, at 11 n.38.

absence of Title II regulation.<sup>26</sup> AT&T's statement that it will deploy more fiber in the coming year is perfectly compatible with the argument that Title II is depressing investment because AT&T would arguably have deployed *even more* fiber without Title II.

Other statements to investors are clearly reassurances that business practices, not business performance, will be unaffected — in other words, that the broadband provider was not engaging in any practices that were outlawed by the 2015 Order, and therefore would not need to change the way it does business. Comcast CEO Neil Smit, for example, said that Title II, “hasn’t really affected the way we have been doing our business or will do our business. We believe in Open Internet and while we don’t necessarily agree with the Title II implementation, we conduct our business the same we always have, transparency and nonpaid peering and things like that.”<sup>27</sup> If anything, statements like this one are merely further evidence that the allegedly harmful practices the 2015 Order sought to address were not pervasive (either then or now). It makes sense that a ban of certain practices would have little impact on the day-to-day business of a company that did not engage in those practices in the first place.

Moreover, many broadband providers made decidedly unambiguous statements, both to investors and to the Securities and Exchange Commission, that Title II regulation was a significant threat to their business prospects and performance. For example, Cable One noted that Title II brought a “very serious rate regulation overhang.”<sup>28</sup> MediaCom

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<sup>26</sup> *Id.*

<sup>27</sup> Free Press Comments, at 214 n.413.

<sup>28</sup> *Id.* at 237.



advised investors that the rules brought “heavy-handed and unfair regulatory burdens.”<sup>29</sup>

Moreover, Comcast stated prominently that Title II “could adversely affect our business”

depending on how the FCC enforced the rules.<sup>30</sup> Verizon elaborated:

these rules limit the ways that a broadband Internet access service provider can structure business arrangements and manage its network and open the door to additional restrictions, including rate regulation that could adversely affect broadband investment and innovation. ... The further regulation of broadband, wireless and our other activities and any related court decisions could restrict our ability to compete in the marketplace and limit the return we can expect to achieve on past and future investments in our networks.<sup>31</sup>

These statements make clear that broadband providers do, in fact, view Title II regulation

as a threat to their future business success, a fact upon which their statements to investors,

the SEC and the FCC have all been consistent.

### III. State and Local Authority

There was a time when state public utility commissions (“PUCs”) and local authorities could properly regulate certain local telecommunications services that crossed no state lines,<sup>32</sup> but those days are over. Broadband is an inherently interstate service,<sup>33</sup> so

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<sup>29</sup> *Id.* at 467.

<sup>30</sup> Comcast Corp., Form 10-K (2016), available at <https://goo.gl/whqcfE>.

<sup>31</sup> Verizon Comms. Inc., Form 10-K at 19 (2016), available at <https://goo.gl/Fw1mtP>.

<sup>32</sup> See, e.g., Alan D. Mathios & Robert P. Rogers, *The Impact of State Price and Entry Regulation on Intrastate Long Distance Telephone Rates*, FED. TRADE COMM’N (Oct. 1988), available at <https://goo.gl/G8KyrG>.

<sup>33</sup> See, e.g., Dan L. Burk, *How State Regulation of the Internet Violates the Commerce Clause*, 17 CATO J. 147, 154 (Fall 1997), available at <https://goo.gl/R93t46> (“The similarity of the Internet to previous interstate ‘instruments of commerce’ such as railroads or trucks is striking. Given that the Internet is not simply a means of communication, but a conduit for transporting digitized information goods such as software, data, music, graphics, and videos, there may be a variety of instances where state regulation of network traffic constitutes an impermissible burden on commerce similar to burdensome regulation of tractor-trailer mud-flaps, or of the length of railway trains”).

Net Neutrality and other regulations of broadband service should be administered solely by Federal agencies: namely, the FCC and FTC.

State and local authorities still have key roles to play, but those roles should be limited to matters that are truly intrastate, such as management of public rights of way and issuance of permits for deploying or upgrading broadband infrastructure.<sup>34</sup> If that is what the National Association of Regulatory Utility Commissioners (“NARUC”) means when it endorses a “functional focus” model of jurisdictional allocation between Federal, state and local governments,<sup>35</sup> then that seems sensible. However, whether their proposal is so limited is unclear.

In its comments, NARUC argued that Section 706 of the Telecommunications Act of 1996 indicates that: “Clearly Congress anticipated that States would continue to play a crucial role with respect to broadband deployment.”<sup>36</sup> We agree that properly calibrated state regulatory regimes are vitally important to broadband deployment, as our previous filings with the Commission have made clear.<sup>37</sup> With respect to deployment, the FCC should

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<sup>34</sup> See, e.g., Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, *Comments of R Street Institute*, WC Docket No. 17-84 (June 15, 2017) [“R Street Wireline Comments”], available at <https://goo.gl/EHgQvd> (offering suggestions for how Federal, state and local governments can work together to promote wireline broadband deployment); Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, *Comments of R Street Institute*, WT Docket No. 17-79 (June 15, 2017) [“R Street Wireless Comments”], available at <https://goo.gl/ojcee2> (offering suggestions for how Federal, state and local governments can work together to promote wireless broadband deployment).

<sup>35</sup> See Restoring Internet Freedom, *Comments of The National Association of Regulatory Utility Commissioners*, WC Docket No. 17-108 at 1 n.2 (July 17, 2017) [“NARUC Comments”], available at <https://goo.gl/SPCkX2>.

<sup>36</sup> *Id.* at 2.

<sup>37</sup> See, e.g., R Street Wireline Comments, *supra* note 34; R Street Wireless Comments, *supra* note 34.

generally respect state and local governments, and preempt their deployment policies only when they are clearly unreasonable.

However, in no event should state or local governments be permitted to regulate broadband service itself, including the network-management, privacy and data-security practices maintained by broadband providers as part of their service offerings. The nexus between these practices and interstate commerce is simply too strong and, as the framers recognized, such commerce is best regulated at the Federal level. Thus, to the extent NARUC calls for state and local governments to have authority to “safeguard consumers’ rights” and “address service quality” by regulating these practices, the Commission should reject that suggestion.<sup>38</sup>

NARUC also suggested that Congressional action may be needed in this area.<sup>39</sup> On this point, we agree wholeheartedly. While we firmly believe that the FCC and FTC can work together to craft a comprehensive and effective Net Neutrality framework under existing law,<sup>40</sup> only Congress can resolve the matter with any real degree of permanence. Insofar as Congress wishes to recalibrate states’ authority over broadband service, it should reaffirm their limited role in the areas of truly intrastate concern, like rights-of-way management or infrastructure deployment. The Commission should provide no authority for states or localities to regulate broadband service itself.

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<sup>38</sup> NARUC Comments, at 4 (internal quotation marks removed).

<sup>39</sup> *Id.*

<sup>40</sup> See R Street Comments, at 27–34.

## IV. Conclusion

Once again, we thank the Commission for launching this proceeding and proposing to Restore Internet Freedom and return to the light-touch regulatory framework for broadband. We strongly support these efforts and look forward to further engagement with the Commission and other stakeholders on these issues.

Respectfully submitted,

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